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JUSTICE, WAR, AND THE JAPANESE-AMERICAN EVACUATION AND INTERNMENT

Book Review of—

JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES

By Peter Irons. New York: Oxford University Press, 1983. Pp. xiii, 407. \$18.95.

Reviewed by Arval A. Morris*

With all the advantages of hindsight, the shameful episode that saw the militarily ordered exclusion and internment of over 112,000 Japanese Americans during World War II without declaration of martial law looms as one of the greatest mass deprivations of civil liberties by the American government since slavery.¹ This harsh, vast, and discriminatory program of uprooting and imprisoning concededly loyal Americans was initiated by an Army general and avidly ordered and supervised by civilian heads of the War Department, defended by the Justice Department, authorized by President Roosevelt, endorsed by Congress, approved by the Supreme Court, and, sadly, supported by the people. The additional sad fact is that except for General DeWitt, every person important to producing this shameful affair was a lawyer. Today, the wartime episode of the Japanese Americans remains an evil blotch upon our national legal conscience and our law, just as it was yesterday and surely will continue to be until the

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1. This shameful episode embodied "one of the most sweeping and complete deprivations of constitutional rights in the history of this nation." *Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting). Thirty-six years later, Congress, by the Commission On Wartime Relocation and Internment Act, Pub. L. No. 96-317, § 2, 94 Stat. 964 (1980), created a commission composed of former members of Congress, the Supreme Court, the Cabinet, and distinguished private citizens. The Commission held hearings in cities across the United States, reviewed documents and made findings and conclusions that were unanimous. In general, the Commission found that "[t]he broad historical causes which shaped these decisions [regarding exclusion and detention] were race prejudice, war hysteria, and a failure of political leadership; that there was substantial credible evidence, known at the time, from governmental agencies indicating that the claimed ground of military necessity was defective and did not warrant the exclusion and detention of ethnic Japanese," and that as a result, "[a] grave injustice was done to American citizens and resident aliens of Japanese ancestry who, *without individual review or any probative evidence against them*, were excluded, removed and detained by the United States during World War II." PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982) (emphasis added).

Japanese-American cases² are repudiated, overruled, and completely excised from our law.

The entire Japanese-American program of World War II violated and degraded our nation's proper legal concerns for individual citizens, qua individuals, and subverted the basic values that inform and sustain a democracy. It disparaged fundamental principles—that guilt is individual; that citizens are to be treated with equal care and concern; that all Americans have the constitutional right to move about freely, to live and work where they choose, and to establish and maintain homes and families—all of which are not to be impaired except on an individual basis, and only

2. *Korematsu v. United States*, 323 U.S. 214 (1944). *Yasui v. United States*, 320 U.S. 115 (1943). *Hirabayashi v. United States*, 320 U.S. 81 (1943). A fourth case and the last one decided at the end of World War II, *Ex parte Endo*, 323 U.S. 283 (1944), resulted in a hollow victory. Mitsuye Endo's challenge was to the internment itself, and was based on habeas corpus. "We are of the view that Mitsuye Endo should be given her liberty" wrote Justice Douglas for a unanimous court. *Ex parte Endo* at 297, but, in "reaching that conclusion we do not come to the underlying constitutional issues" because "we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedures." *Id.* "A citizen who is concededly loyal presents no problem of espionage or sabotage" because "[h]e who is loyal is by definition not a spy or a saboteur" and "detention which has no relationship to [those] objective[s] is unauthorized." *Id.* at 302. Thus, Mitsuye Endo, a concededly loyal American, obtained her freedom after more than two years of detention because her detention was beyond the scope of all agency authority and not because her constitutional rights had been violated: the War Relocation Authority's power "to detain a citizen or grant him a conditional release as protection against espionage or sabotage is exhausted *at least when his loyalty is conceded*;" if the Court held otherwise, it "would transform an espionage or sabotage measure into something else" and "[t]hat was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it." *Id.* at 302 (emphasis added).

The Court announced its *Endo* and *Korematsu* decisions on Monday, December 18, 1944. One day earlier, in an unusual and amazingly timed press release by General Henry Pratt, then head of the Western Defense Command, the War Department announced that "[t]hose persons of Japanese ancestry whose records have stood the test of Army scrutiny during the past two years," (i.e., they concededly were loyal) would be released from internment after January 2, 1945, and would be "permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens." Thus, by revoking the mass exclusion orders issued in 1942, General Pratt preempted the Supreme Court by one day, freeing Mitsuye Endo and many additional thousands of Japanese Americans, after two years of unjustified incarceration.

Was the timing of General Pratt's announcement fortuitous? Peter Irons thinks not, basing his remarks on an interview with Robert Daniels, an historian who relies on an unnamed source working in the office of John J. McCloy, Assistant Secretary of War at the time, and claims that "McCloy was told by Frankfurter of the date the Supreme Court would issue the *Endo* opinion." Despite the hearsay quality of their evidence, Irons reasonably concludes, "it seems clear that the War Department was privy to the Court's timetable in the *Korematsu* and *Endo* cases." P. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES, 345 (1983) [hereinafter cited as IRONS]. Endo's "victory" was hollow, and all Americans lost too.

For scathing condemnations of these decisions, see Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945); see also M. GRODZINS, AMERICANS BETRAYED 354 (1949). Peter Irons states that in the years since the publication of the Dembitz and Rostow articles "not a single legal scholar or writer has attempted a substantive defense of the Supreme Court opinions." IRONS, *supra* at 371.

after adequate notice, hearing, fair trial, and due process of law. The Japanese-American program destroyed basic and precious constitutional rights of equal participation in a democracy—the right to peaceably assemble; the rights of free speech and press; the rights freely to read, learn, and hear; the right to vote, seek and hold public office; and the right and responsibility to defend, with one's life if need be, one's beloved native land. German Americans or Italian Americans were not subjected to this kind of wartime treatment. Dangerously, it loosened judicial control of the military. In summary, from a legal point of view, the shameful "Japanese-American episode culminated in a constitutional sanctification of these deprivations by the highest court in the land—a court dedicated to justice, defense of the Constitution, determination of the powers and limitations of government, and protection of the rights of men."³

In his highly recommended book, *Justice at War*,⁴ Peter Irons shows in absorbing detail how it all happened. In the course of tracing the legal histories of the four most important cases,⁵ he also shows how the exclusion and detention program tainted and tarnished almost everyone involved—including a long list of certified liberal heroes. Moreover, he presents disturbing evidence that the Supreme Court was factually misled by the Justice Department.

On an inadequate factual basis, President Roosevelt and a Congress dominated by New Deal Democrats gave carte blanche power to a bona fide racist, Lieutenant General John L. DeWitt, to subject Japanese Americans to military control and detention without first declaring martial law. Earl Warren, then Governor of California, firmly supported the program. A distinguished group of New Deal liberals serving on the national American Civil Liberties Union (ACLU) governing bodies—people like Morris Ernst, Whitney North Seymour, Corliss Lamont, John Dos Passos, Elmer Rice, and Max Lerner—subordinated civil liberties to wartime considerations and to a strong political loyalty to President Roosevelt. By a two-to-one vote, the national ACLU supported the government's right during wartime "to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law."⁶

3. J. TENBROEK, E. BARNHART & F. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 325–26 (1968). This altogether excellent book is required reading for any serious understanding of this period.

4. IRONS, *supra* note 2. Peter Irons is a graduate of Harvard Law School and holds a Ph.D. from Boston University. He is the author of *THE NEW DEAL LAWYERS* (1982), and is a professor of political science at the University of California, San Diego.

5. See *supra* note 2.

6. IRONS, *supra*, note 2, at 129. (quoting from the Frank-Greene ACLU resolution). There was a qualifying condition attached, but, nevertheless, the basic point remains. The qualifier stated that the

To their credit, ACLU people at the local level, such as Mary Farquharson and Art Barnett in Seattle and Ernest Besig in San Francisco, strongly resisted and refused to withdraw,⁷ thereby maintaining an ACLU presence in the cases. Their position was that without a formal declaration of martial law, the government could not authorize the military to remove any citizen from his home. The national ACLU board disagreed, and would only allow its lawyers to argue the narrower claim that the military orders were invalid because they were applied in a racially discriminatory manner. The national board ultimately prevailed over the local ACLU's in the cases.

Edward Ennis, who was then in the Department of Justice's Alien Enemy Control Unit and later served with distinction as general counsel of the ACLU, repeatedly closeted his conscience and suppressed his best judgment, carrying out the dictates of his superiors. The response of the National Lawyers Guild was even more disappointing. It "actually backed the wartime internment program."⁸ "The Guild's wartime policy was that of 'complete support' for Roosevelt and the American-Soviet alliance"⁹

Justice Hugo Black, with the approval of William O. Douglas, wrote the opinion for the Supreme Court in *Korematsu*,¹⁰ in which he denied that the Japanese-American internment program was based in any part on racial antagonism. He argued that it had been based on reasonable congressional and military judgments, relying on General DeWitt's *Final*

national ACLU would support evacuation "only if directly necessary to the prosecution of the war or defense of national security" and only if evacuation was "based upon a classification having a reasonable relationship to the danger intended to be met," presumably on the ground of some "reasonable basis." *Id.* at 129. Within a week, on June 22, 1942, the national ACLU board promptly moved to implement its new policy instructing its Director, Roger Baldwin, to inform the ACLU's local West Coast branches that "local committees are not free to sponsor cases in which the position is taken that the government has no constitutional right to remove citizens from military areas" and to "advise the defendants in the test cases already brought to arrange, if they desire, for counsel who will be free to raise other constitutional issues." *Id.* at 130.

7. Mary Farquharson and Art Barnett acted as volunteers in the *Hirabayashi* case. Farquharson wrote Baldwin from Seattle saying she was "shocked . . . to learn of the action" of the national ACLU Board. IRONS, *supra* note 2, at 131. Ernest Besig, Director, Northern California ACLU, refused to back down, writing Baldwin from San Francisco that "we feel compelled to proceed as before, because we cannot in good conscience withdraw from the [*Korematsu*] case at this late date." He pointedly reminded the national ACLU director that "at the time of our intervention in this case we were acting in complete accord with the Board's position." *Id.* On the other side of the local ledger, Karl Bendetsen of Aberdeen, Washington, a very important figure in the evacuation program as an advisor to General DeWitt, displayed a "single-minded and efficient dedication" to the "internment campaign." *Id.* at 31; see also *id.* at 38 *passim*, 58, 64 *passim*.

8. *Id.* at 181.

9. *Id.* "Weighed against the wartime sacrifices of the Soviet people, the plight of the Japanese Americans failed to evoke the Guild's sympathy for the test cases." *Id.*

10. *Korematsu v. United States*, 323 U.S. 214 (1944).

Report on the evacuation stating that there were disloyal Japanese Americans; that their identity could not reliably and quickly be determined; that the West Coast was vulnerable to enemy attack, which disloyal Japanese Americans surely would aid; and that, therefore, an emergency justified the internment measures, which lasted more than two years.

Justices Black, Douglas, and others apparently ignored the racism stated in General DeWitt's *Final Report*. He had branded *all* people of Japanese ancestry as members of "an enemy race," and apparently the Justices ignored General DeWitt's reasoning when, after admitting he had no evidence of Japanese-American complicity in actions against the United States, he incredibly concluded that "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken"¹¹ Justices Roberts, Murphy, and Jackson dissented, with Justice Murphy declaring: "I dissent, therefore, from this legalization of racism."¹² How did it all happen?

CREATING THE PROGRAM

In a surprise attack Japan bombed Pearl Harbor on December 7, 1941. Thereafter, no internal group appeared to be a more likely target for retribution than the 117,000 Japanese-American citizens and Japanese aliens who lived on the West Coast. The initial response, however, was surprisingly sane;¹³ but "some six weeks after Pearl Harbor . . . the tide of public opinion abruptly shifted."¹⁴ On January 16, 1942, Congressman Leland Ford, in identical letters to Secretary of the Navy Frank Knox, and Federal Bureau of Investigation (FBI) Director J. Edgar Hoover, urged that "all Japanese, whether citizens or not, be placed in inland concentration camps."¹⁵ The manager of the Grower-Shipper Vegetable Association, a powerful force in some congressional districts, replied to the charge that they wanted "to get rid of the Japs for selfish reasons" by saying that "[w]e might as well be honest. We do. It's a question of whether the white man lives on the Pacific Coast or the brown man."¹⁶

11. IRONS, *supra* note 2, at 59, quoting DeWitt's Final Report, U.S. Dept. of War, *Final Report, Japanese Evacuation From the West Coast, 1942* 33-34 (Wash. D.C., 1943).

12. *Korematsu*, 323 U.S. at 242 (Murphy, J. dissenting).

13. For example, from December 8, 1941, until January 30, 1942, the *Los Angeles Times* published editorials urging that "there be no precipitation, no riots, no mob law"; that "thousands of Japanese here and in other coast cities" were "good Americans, born and educated as such"; and that the Japanese American Citizens League had promised its "fullest cooperation and its facilities" to the government. The *Times* cautioned "Let's Not Get Rattled." IRONS, *supra* note 2, at 6.

14. IRONS, *supra* note 2.

15. *Id.*

16. *Id.* at 39-40.

President Roosevelt's commission to investigate the attack on Pearl Harbor, headed by Supreme Court Justice Owen J. Roberts, released its report, which was headlined in the Sunday papers on January 25, 1942. The Roberts Commission placed blame for lack of preparedness squarely on the Army and Navy commanders in Hawaii; but it also stated that Japanese consular officials in Hawaii were part of an espionage ring that included "persons having no open relations with the Japanese foreign service," and that this ring had sent "information about U.S. military installations to the Japanese Empire."¹⁷ This flatly asserted imputation of disloyal acts to Japanese Hawaiians has never been documented, but the racial die was cast. It was all downhill after that. On January 28, 1942, the *Los Angeles Times* editorialized that "the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots" on the West Coast.¹⁸ Much earlier, on January 4, in a private conference, General DeWitt, referring to Japanese Americans and displaying his racism confessed "no confidence in their loyalty whatsoever"; he clarified his remarks saying, "I am speaking now of the native born Japanese . . . 42,000 in California alone."¹⁹ Thereafter, he became adamant about excluding and relocating them.²⁰ It had become a "military necessity."

Despite his basic humanitarian impulses, President Roosevelt's record reflects "a limited awareness of and attention to the plight of racial minorities."²¹ Segregation was the law of the land. Politically, he depended on Southerners who had racist values and dominated Congress, and he himself was insensitive to the plight of Japanese Americans. In early February, 1942, on the urgings of General DeWitt, Secretary of War Henry L. Stimson decided to put a question to Roosevelt: "Is the President willing to authorize us to move Japanese citizens as well as aliens from restricted areas?"²² Without answering this question directly, Roosevelt told Stimson "to go ahead on the line that [he] thought the best." Imme-

17. *Id.*

18. *Id.* at 7.

19. *Id.* at 37.

20. Indeed, General DeWitt sought to influence the drafting of the congressional statute that ratified and implemented Roosevelt's Executive Order 9066 evacuating all persons of Japanese descent from the West Coast: "the recommendation of General DeWitt [was] that prison terms be mandatory" for Japanese Americans found in any military zone where their presence had been prohibited by military orders. Calling attention to the fact that "you have greater liberty to enforce a felony than you have to enforce a misdemeanor," Karl Bendetson, General DeWitt's aid, "quoted DeWitt as saying that 'you can shoot a man to enforce a felony.'" John J. McCloy "shrank from [DeWitt's] trigger-happy proposal, and changed the statute that Bendetson had drafted to reduce the crime of violating a military order to a misdemeanor" *Id.* at 65.

21. *Id.* at 57.

22. *Id.*

diately thereafter, Stimson's assistant, John J. McCloy, telephoned Karl Bendetsen at the Presidio in California, reporting that "we have carte blanche to do what we want to as far as the President's concerned."²³ Mass racial evacuation was on the move.

On February 19, 1942, seventy-four days after Pearl Harbor, President Roosevelt, as President and as Commander-in-Chief, signed Executive Order 9066. This order conferred authority on the War Department to designate military zones "from which any or all persons may be excluded" and to place further restrictions on "the right of any person to enter, remain in, or leave" such areas at the discretion of military authorities.²⁴ Thus a racially based, military system of curfew, exclusion and internment of concededly loyal Americans was authorized without any declaration of martial law. The rights of more than 112,000 Japanese Americans became subject to military edict when, on March 2, 1942, General DeWitt declared the entire West Coast a "designated military area." His aide, Karl Bendetsen, prepared the initial draft of a ratifying statute for Congressional approval. Congress hurriedly ratified the president's action when it passed Public Law 503—with only a ten minute "debate" in the House and scarcely more in the Senate—incorporating the standards of Executive Order 9066, criminalizing their violation and also criminalizing violations of military orders, such as the curfew and evacuation proclaimed thereunder.²⁵

HIRABAYASHI AND RACIAL CURFEW

A meager handful of cases were generated, and space permits only two to be considered.²⁶ Gordon Hirabayashi, now in his mid-sixties and a Professor of Sociology in Canada, was a student at the University of Washington in March, 1942, living with a dozen other students in a dormitory at the campus YMCA. He was and is a pacifist of principled com-

23. *Id.* at 58.

24. *Id.* at 63.

25. *Id.* at 66–67. Conservative Senator Robert Taft (Ohio) raised the sole objection in the Senate saying,

I think this is probably the 'sloppiest' criminal law I have ever read or seen anywhere. It does not say who shall prescribe the restrictions. It does not say how anyone shall know that the restrictions are applicable to that particular zone. It does not appear that there is any authority given to anyone to prescribe any restriction . . . I have no doubt that in peacetime no man could ever be convicted under it, because the Court would find that it was so indefinite and so uncertain that it could not be enforced under the Constitution.

Id. at 68. On March 18, 1942, President Roosevelt signed Executive Order 9102, which created the War Relocation Authority as the civilian agency jointly responsible with the War Department for the evacuation program.

26. I deal only with the *Hirabayashi* and *Korematsu* cases. For example, I do not deal with *Yasui v. United States*, 320 U.S. 115 (1943).

mitment and deep religious conviction.²⁷ Like all Japanese Americans, Hirabayashi was subject to General DeWitt's curfew order, requiring him to be at home each night from 8 p.m. until 6 a.m. One night when it was about five minutes of eight and he was running to his campus YMCA room he stopped and said to himself: "Why the hell am I running back? Am I an American or not? Why am I running back and nobody else is?"²⁸ He kept a diary of his activities, and he first broke curfew on May 4, 1942, when his friend, Helen Blom, had come to the YMCA to return his raincoat, and "though it was 8 p.m.," he walked her home.²⁹

Hirabayashi came to the firm conclusion that he would use himself to test the constitutionality, not of General DeWitt's curfew order, but of General DeWitt's more important orders excluding Japanese Americans from the West Coast—an order under which Hirabayashi was subject to evacuation on May 16—and the order interning them in detention camps. Twenty-four years old, Hirabayashi arrived at the FBI office in Seattle on May 16, 1942, accompanied by his lawyer, Arthur Barnett. Hirabayashi told a surprised Special Agent Francis Manion that he must live by his "Christian principles," that he felt it his "duty to maintain the democratic standards for which this nation lives," and that "[t]herefore, I must refuse this order for evacuation,"³⁰ thereby raising a most fundamental constitutional question. Agent Manion confiscated Hirabayashi's briefcase containing the diary in which he admitted to three curfew violations between May 4 and May 10.

27. Gordon Hirabayashi grew up in an unconventional family. Born in 1918 . . . Hirabayashi absorbed the pacifism of his parents, Japanese natives who belonged to a sect called "Friends of the World." Similar in organizational form and belief to the Quakers. . . .

When he entered the University of Washington in Seattle in 1937, Hirabayashi became active in the student religious and social-action groups He assumed a leadership role in the student YMCA and the Japanese Student's Club, and also joined the Seattle chapter of the Japanese American Citizens League. . . .

As a YMCA officer, Hirabayashi traveled to New York City in the summer of 1940 to attend the "President's School" held jointly at Columbia University and the affiliated Union Theological Seminary. Here he was exposed in seminars and discussions to the social activism and pacifism preached by A.J. Muste, Evan Thomas (brother of Socialist Party leader Norman Thomas), and John Nevin Sayre, all members of the pacifist Fellowship of Reconciliation (FOR). This experience proved to be a turning point in the young student's life. "I guess I was ready for that philosophy," Hirabayashi later said. "It all made sense, and the fact that my parents belonged to this non-conformist, non-church Christian group from Japan made these things at home to me." Hirabayashi joined the FOR, which advocated nonviolent but militant resistance to war and military service, during his summer in New York. On his return to Seattle, he registered with his local draft board as a conscientious objector and was granted that status without objection.

IRONS, *supra* note 2, at 89-90.

28. *Id.* at 90.

29. *Id.* at 91.

30. *Id.* at 88.

Gordon Hirabayashi was convicted on two counts—of intentionally violating both General DeWitt's evacuation order and his curfew order. On appeal, the Ninth Circuit Court of Appeals did not decide his case but certified questions of law about each conviction to the Supreme Court of the United States, making possible a definitive, early decision on the constitutional foundations of the Japanese-American evacuation and internment program.³¹ In an opinion on June 21, 1943, by Chief Justice Stone, the Supreme Court ducked the hard issues of evacuation and internment. It upheld Hirabayashi's conviction for violating curfew but refused to review the more profound question of his conviction for refusing to submit to evacuation, on the weak ground that Hirabayashi's "sentences on the two counts are to run concurrently and conviction on the second [curfew] is sufficient to sustain the sentence."³² Thus, the Court put off the more difficult evacuation-internment issue, and it took an additional year before returning in *Korematsu*'s case.

The most fundamental issue decided by the Court in *Hirabayashi* was whether General DeWitt's curfew order could be selectively applied on a racial basis solely to all Japanese Americans and Japanese aliens whether loyal or not. Hirabayashi admitted that a military curfew applying generally to all persons in a "designated military zone" was an obvious device protecting against sabotage, most readily committed during the hours of darkness. But General DeWitt's curfew was selective, applying only to persons of Japanese descent. As such, it was both over- and under-inclusive because thousands upon thousands of Japanese Americans were concededly loyal Americans and needlessly subjected to the curfew, while disloyal persons not of Japanese descent were not subject to the curfew at all. Thus, General DeWitt's curfew order was squarely grounded on race. Nevertheless, the Supreme Court upheld it.

Five years earlier in the famous Footnote Four to the *Carolene Products* case,³³ Justice Stone stated that there

may be a narrower scope for operation of the presumption of constitutionality when legislation appears . . . directed at . . . racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.³⁴

Ignoring this doctrine requiring heightened judicial scrutiny of racial

31. *Hirabayashi v. United States*, 320 U.S. 81, 83–85 (1943).

32. *Id.* at 105.

33. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

34. *Id.* at 152 n.4 (citations omitted).

classifications, Chief Justice Stone ruled in *Hirabayashi* that governmental action need only have a minimal rational basis.³⁵

Irons' research into Supreme Court archives and draft opinions reveals that "Stone swallowed whole the 'racial characteristics' arguments made in the briefs submitted by the Justice Department and the three West Coast states and repeated by Solicitor General Fahy in his oral argument before the Supreme Court."³⁶ Citing undocumented allegations that Japanese Americans posed a fifth-column danger, their location in designated military areas, their supposed adherence to Shintoism (Hirabayashi had become a Quaker), and the system of dual citizenship maintained by the law of Japan, Stone concluded that "the nature and extent of the racial attachments of our Japanese inhabitants to the Japanese enemy were consequently matters of grave concern" to General DeWitt.³⁷ Stone recognized that hostile governmental action based on race is odious, but "measures necessary for the successful prosecution of the war" could override constitutional concerns "and justify military orders 'which place citizens of one ancestry in a different category from others.'" ³⁸ The Court referred four times to "facts and circumstances" that General DeWitt possibly may have relied upon to "show that one racial group more than another" constituted "a greater source of danger" to the Army's wartime efforts."³⁹

Irons observes that Stone wrote his *Hirabayashi* opinion without knowledge of the Office of Naval Intelligence's *Ringle Report* (known to General DeWitt), which estimated the highest number of Japanese Americans "who would act as saboteurs or agents" of Japan as "less than three percent of the total, or about 3500 in the entire United States." Moreover, according to the report, "the most dangerous [were] already in custodial detention" or were "well known to the Naval Intelligence service or the F.B.I." Ringle summarized: "In short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people [and] should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis." Ringle proposed immediate individualized hearings for residents of internment camps for deciding whether grounds existed to retain the

35. "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew." *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943).

36. IRONS, *supra* note 2, at 235.

37. *Id.* at 235-36.

38. *Id.* at 236.

39. *Id.* "Gordon Hirabayashi became the only defendant forced back into prison by the Supreme Court." IRONS, *supra* note 2, at 250-51.

individual as “potentially dangerous.”⁴⁰ Thus, as General DeWitt knew but the Court did not, the Navy believed that 90% of the Army’s evacuation of Japanese Americans was unnecessary and that a maximum of about 10,000 persons necessary for evacuation could readily be identified, most by name.

Edward Ennis discovered the *Ringle Report* and made it known to Solicitor General Fahy a few days before the government filed its brief in the *Hirabayashi* case, saying that “one of the crucial points” in *Hirabayashi* forced the government to argue “that individual selective evacuation would have been impractical and insufficient,” but now “we have positive knowledge that the only Intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary.”⁴¹ Ennis advised Fahy that the Justice Department had “a duty to advise the Court of the existence of the Ringle memorandum . . . [and] that any other course of conduct might approximate the suppression of evidence.”⁴² But the government’s brief did not bring the *Ringle Report* to any court’s attention. Instead, it argued that the rationale behind General DeWitt’s orders was “not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area” and that “the identities of the potentially disloyal were not readily discoverable” and “virtually impossible” to determine on the basis of individualized hearings.⁴³

In addition to the *Ringle Report*, Stone “did [not] know that General DeWitt’s own intelligence staff had disclaimed any involvement by Japanese Americans in espionage or sabotage in the period after Pearl Harbor”⁴⁴ because responsible authorities failed to bring that information to the Court’s attention. Because the Court practically abdicated review of military and Congressional action in *Hirabayashi*—“it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs”⁴⁵—Irons laconically observes: “Whether knowledge of this material would have affected the outcome of the case is a matter of speculation.”⁴⁶ Korematsu’s case was left. Perhaps the Court would treat

40. Quotations from the *Ringle Report* come from IRONS, *supra* note 2, at 203.

41. *Id.* at 204.

42. *Id.*

43. *Id.* at 205.

44. *Id.* at 249.

45. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

46. IRONS, *supra* note 2, at 249. The *Los Angeles Times* hailed *Hirabayashi* as “heartening news for the Pacific Slope, where opinion has held with similar unanimity that the presence of any Japs here is dangerous in wartime” and that “[a]gitation for the return of Japs to the Pacific Coast—which has gained recruits in high circles in Washington—gets its devastating answer from the clear analysis of the situation by Justice Stone” *Id.* at 251–52. Representative J. Leroy Johnson of California proposed to Congress a postwar deportation of all Japanese aliens and “disloyal” citizens as “a way

the government's power to exclude an American from his home differently from the government's power to keep him in it.

KOREMATSU AND RACIAL EVACUATION

Three weeks after his evacuation deadline, confident he would not be recognized as a Japanese American, Fred Toyosaburo Korematsu, a 23-year-old welder from Oakland, was picked up on May 30, 1943, by the San Leandro police as he was walking down the street with his Caucasian fiancée, Ida Boitano. Being in love, they had decided that Korematsu should have "plastic surgery on his eyes and nose" during March 1942, and that thereafter, "it might be possible for them to go to Arizona and get married without anyone suspecting [he] was Japanese." Otherwise, "he feared violence should anyone discover that he, a Japanese, was married to an American girl."⁴⁷ Korematsu told the police that he was of "Spanish-Hawaiian" origin, born in Las Vegas, and that his parents and family had been killed in a fire that burned their house to the ground. His story quickly fell apart when he was confronted with the facts that he spoke no Spanish and that his draft card had been clumsily altered with an ink eradicator. Thereafter, Korematsu confessed all. As the Supreme Court described it, "[n]o question was raised as to [Korematsu's] loyalty to the United States."⁴⁸ He "was convicted . . . for remaining in San Leandro, California, a 'Military Area,' contrary to Civilian Exclusion Order No. 34 of the Commanding General [DeWitt] of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area."⁴⁹ Thus, racially based exclusion and internment finally came before the Court.

Upholding Korematsu's conviction in December 1944, Justice Black's Opinion for the Court recognized that the "Hirabayashi conviction and this one thus rest on the . . . same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage."⁵⁰ The Court further recognized that exclusion from one's home "is a far greater deprivation" than being confined to it under a curfew

to get rid of a group that may make future trouble." Governor Earl Warren said that "nothing more destructive to our defense could happen than to release the potential fifth columnists" and that the return of Japanese Americans to the West Coast would result in sabotage and "a second Pearl Harbor in California." *Id.* at 250-51.

47. IRONS, *supra* note 2, at 95. The FBI report made at the time of his arrest describes Korematsu as a member of the "yellow race," observing: "Scars or marks—Cut scar on the forehead, lump between eyebrows on nose." *Id.* at 94.

48. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

49. *Id.* at 215-16.

50. *Id.* at 217.

order.⁵¹ Nevertheless, Korematsu's case was controlled by *Hirabayashi*. In light of the decision in *Hirabayashi*, Black wrote, "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast area at the time they did"⁵² because, judged under *Hirabayashi's* minimal rationality test, "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage"⁵³ and "because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal."⁵⁴

Refusing to go behind General DeWitt's decision and evaluate its reasonableness, the Court strained to separate the inseparable in order to duck the issue whether concededly loyal Americans, like Korematsu, could be interned, which was the inevitable next step after evacuation for almost every Japanese American. The Court restricted its *Korematsu* holding strictly to the question of evacuation, ruling that because Korematsu had "not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of [DeWitt's] order."⁵⁵

Like Stone in *Hirabayashi*, Justice Black wrote his *Korematsu* opinion without knowledge of the *Ringle Report*, which Edward Ennis had denounced as "suppression of evidence,"⁵⁶ and without knowledge that General DeWitt's own intelligence staff had disclaimed any involvement by Japanese Americans in espionage or sabotage in the period after Pearl Harbor. A more disturbing concern was the shameful way in which General DeWitt's *Final Report* on the evacuation was suppressed in *Hirabayashi* but ultimately brought to the attention of the Supreme Court in *Korematsu*. There were two versions of this report, and Irons charges that in "one significant respect, the differences between the two versions resulted in misleading the Supreme Court in all three of the criminal test cases that challenged General DeWitt's military orders."⁵⁷

General DeWitt's *Final Report* was ten months in preparation by a team headed by Colonel Karl Bendetsen, a lawyer from Aberdeen, Washington. Assistant Secretary of War John J. McCloy, a lawyer, received two printed and bound copies of it on its publication date of April 19,

51. *Id.* at 218.

52. *Id.* at 217-18.

53. *Id.* at 218.

54. *Id.* at 219.

55. *Id.* at 222.

56. See *supra* note 40 and accompanying text.

57. IRONS, *supra* note 2, at 207. The cases are *Hirabayashi*, *Korematsu*, and *Yasui v. United States*, 320 U.S. 115 (1943).

1943, well before briefs were due in the Supreme Court in the *Hirabayashi* case, and a covering letter from Bendetsen saying that he understood “there is an urgent need of the material contained therein for use in the preparation of the Federal Government’s briefs in the cases now pending before the Supreme Court of the United States challenging the constitutionality of the entire program.”⁵⁸

McCloy’s hasty review of the report caused him concern for two reasons, both damaging to the government’s case. First, in the Foreward, General DeWitt flatly stated his opposition to the return of Japanese Americans to the West Coast at any time during the war irrespective of their loyalty.⁵⁹ Second, in the important chapter entitled the “Need for Military Control and for Evacuation,” General DeWitt asserted, contrary to the Navy’s *Ringle Report*, that it had been “impossible to establish the identity of the loyal and the disloyal with any degree of safety.” But, his next sentence claimed: “It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the ‘sheep from the goats’ was unfeasible.”⁶⁰ Thus, General DeWitt appears to have been clearly motivated by racial considerations, that is, he believed Japanese Americans were such a “tightly-knit racial group” that separation of the disloyal from the loyal simply could not have been accomplished by any means. Yet earlier, in his January 27, 1943 memo to the War Department, General DeWitt flatly stated that “there was time to determine loyalty” once the evacuation group had been collected together into assembly centers. Equally damaging was General DeWitt’s admission that lack of time to conduct individualized loyalty hearings had not been a factor in his decision ordering evacuation.⁶¹ Thus, the “military necessity” argument of the government became vulnerable to the counter-argument that the Japanese Americans had been deprived of individualized hearings and due process of law.

McCloy telephoned Bendetsen, who told McCloy that only ten copies of the *Final Report* had been printed, published, and transmitted. Under pressure from McCloy and Bendetsen, General DeWitt accepted McCloy’s revision of the offending two sentences, now to read: “To complicate the situation no ready means existed for determining the loyal

58. IRONS, *supra* note 2, at 207, quoting Ernest Besig, director of the Northern California ACLU.

59. *Id.*

60. *Id.* at 208.

61. *Id.*

and the disloyal with any degree of safety. It was necessary to face the realities—a positive determination could not have been made.”⁶²

McCloy’s editing eliminated General DeWitt’s admission that lack of time to conduct loyalty hearings had not been a factor in General DeWitt’s evacuation decision. He disingenuously had substituted for General DeWitt’s racism claim (that in any event it was impossible to determine loyalty) the explanation that the Army had no “ready means” by which to perform the task. The other copies of General DeWitt’s published *Final Report* were tracked down and removed from War Department files. “McCloy then instructed General DeWitt to submit a second transmittal letter along with a revised and reprinted version of the *Final Report*, as if the first had never existed.”⁶³ Knowing DeWitt was in the process of preparing his report, the Justice Department earlier filed a pending request with the War Department for all “published material” on the evacuation. The Justice Department wanted to use General DeWitt’s report to prepare its brief in *Hirabayashi*. Although available, McCloy took no chances and failed to provide either version of the report to the Justice Department. “Protected by a ‘Confidential’ security label, the *Final Report* was not in fact released by the War Department until January 1944, more than seven months after the Supreme Court decided” *Hirabayashi*,⁶⁴ but in time for the Court’s consideration of *Korematsu*.

Ennis was outraged when General DeWitt’s *Final Report* was made public because, *inter alia*, the War Department had deliberately withheld it during preparation of the *Hirabayashi* brief. Moreover, he discovered that there were two versions of the report and that his pending request for “published materials” had not been honored. To avoid possible embarrassment with the Supreme Court, “Ennis asked Attorney General Biddle late in January 1944 to put the FBI to work on a dissection of the DeWitt report.”⁶⁵ General DeWitt’s report claimed that “substantially every ship leaving a West Coast port was attacked by an enemy submarine in the weeks after Pearl Harbor,” but J. Edgar Hoover reported that

there is no information in the possession of this Bureau . . . which would indicate that the attacks made on ships or shores in the area immediately after Pearl Harbor have been associated with any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights.⁶⁶

The last item was important to Ennis because General DeWitt’s *Final*

62. *Id.* at 210.

63. *Id.* at 211.

64. *Id.* at 212.

65. *Id.* at 280.

66. *Id.* at 280–81.

Report cited “the interception of illicit radio transmissions” as military justification for his evacuation order, and also charged the Justice Department had “impeded” his search for clandestine transmitters. Ennis wrote to the Federal Communications Commission (FCC) chairman, asking for information.

George Sterling, head of the FCC’s Radio Intelligence Division, earlier had submitted a memorandum dated January 9, 1942, a month before General DeWitt formally recommended mass evacuation, and recounted a meeting he had with General DeWitt. “Gen’l. DeWitt . . . seemed to believe that the woods were full of Japs with transmitters,” so “I proceeded to tell him and his staff” about FCC radio-monitoring operations.⁶⁷ Referring to General DeWitt’s operation, Sterling said, “Frankly, I have never seen an organization that was so hopeless to cope with radio intelligence requirements.”⁶⁸

After his meeting with Sterling, General DeWitt requested that the War Department establish “a joint Radio Intelligence Center for the purpose of coordinating radio intercept . . . information now being collected by the Army, Navy and FCC.” This was done, and the FCC operated sixteen monitoring stations on the West Coast capable of pinpointing “the exact house and room in which a transmitter was located if necessary.” Moreover, early in 1942, at General DeWitt’s request, the FCC set up fully equipped roving coastal patrols, and by July 1, 1942, they had investigated 760 reports of suspicious radio signals—641 turned out not to be radio signals at all and the remaining 119 were traced to Army and Navy transmitters. “No cases involved signals which could not be identified.” Sterling was emphatic, “there wasn’t a single illicit station and General DeWitt knew it.” On April 4, 1944, the FCC chairman, James L. Fly, after reviewing all his sources of information wrote to Attorney General Biddle, summarizing that “[t]here were no radio signals reported to the Commission which could not be identified, or which were unlawful”; moreover, “the Commission knows of no evidence of any illicit radio signaling in this area during the period in question.”⁶⁹

The FBI and FCC bombs went off in a memo about the *Korematsu*

67. *Id.* at 283.

68. *Id.*

The personnel is unskilled and untrained. Most are privates who can read only ten words a minute. They know nothing about signal identification, wave propagation and other technical subjects, so essential to radio intelligence procedure. They take bearings with loop equipment on Japanese stations in Tokio . . . and report to their commanding officers that they have fixes on Jap agents operating transmitters on the West Coast. These officers, knowing no different, pass it on to the General and he takes their word for it. It’s pathetic to say the least.

Id.

69. *Id.* at 284.

brief from John Burling to Solicitor General Fahy. “The unmistakable inference of the *Final Report*, Burling wrote, was that among the most important factors making evacuation necessary were reports of frequent signaling by unlawful radio transmitters from Japanese Americans on shore to submarines at sea.”⁷⁰ But the FBI had concluded that “no one was ever seen signaling from a house or elsewhere to Japanese ships off shore,” and the FCC had found that “there was no unlawful radio signaling going on.” Thus, Burling concluded,

we are now . . . in possession of substantially incontrovertible evidence that the most important statements of fact advanced by General DeWitt to justify the evacuation and detention were incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report to General Marshall.⁷¹

Burling, believing the Department had an ethical obligation to the Court to refrain from citing and relying on the *Final Report*, sent the final draft of the Justice Department’s *Korematsu* brief to the printer containing a footnote clearly designed to alert the Supreme Court to the Department’s disavowal and repudiation of much of General DeWitt’s *Final Report*.⁷² But the printing presses were stopped when John J. McCloy of the War Department discovered the footnote and asked Solicitor General Fahy to remove it. Burling and Ennis balked. Assistant Attorney General Herbert Wechsler, a Columbia Law Professor and a supervisor of the *Korematsu* brief, played the role of negotiator and drafted a new, compromise footnote acceptable to the War Department and to Solicitor General Fahy. It eliminated any reference to the espionage allegations in General DeWitt’s report: “We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the *Final Report* only to the extent it relates to such facts.”⁷³ Thereafter it would take a very clever and discriminating reading between the lines to discern any substantive

70. *Id.* at 285.

71. *Id.*

72. The footnote read:

The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.

Id. at 286.

73. *Id.* at 290–91.

criticisms of General DeWitt's *Final Report*. On October 5, 1944, the *Korematsu* brief was delivered to the Supreme Court, and misleading semantic ambiguity triumphed over outright repudiation of General DeWitt's *Final Report*.⁷⁴

The Court in *Korematsu* based its opinion on General DeWitt's unfounded "finding" that Japanese Americans posed a danger of espionage on the West Coast. The Court never went behind General DeWitt's "finding" to evaluate its underlying facts independently. Perhaps Burling's footnote would have moved the Court to do so, but perhaps not. Given the Supreme Court's obvious willingness to uphold the Japanese-American evacuation, would its decision in *Korematsu* have been any different if Burling's disputed footnote had been included?⁷⁵

Except for the roles played by a few lawyers, the World War II internment of Japanese Americans does not bring glory to the legal profession. Some forty lawyers took part, over a period of three years, in the legal battles that preceded and followed Roosevelt's signing of Executive Order 9066, and twenty judges ruled on the cases that challenged the internment orders. The outcome of the cases reflected the failure of the legal system that should have stood as a bulwark resisting racism, war hysteria, and the failure of leadership at high levels of government. Instead, it was lawyers and judges who produced what Justice Jackson aptly labeled in his *Korematsu* dissent, "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Although *Korematsu* may currently be honored in the breach, its fundamental claim of "pressing public necessity"—short of a declaration of martial law—was upheld by the Court in 1944. It is capable of revival and

74. Although the Court ducked the issue, the Justice Department's brief also addressed the question of detention, seeking to defend it. The brief relied almost completely on General DeWitt's *Final Report*'s "preventive detention" rationale, the facts for which Burling, in a memorandum to Fahy, identified as "erroneous" and stated that the Justice Department "can support detention only if it informs the Court, on the strength of its own reputation for veracity," that General DeWitt's claim was factually true. But, "we know DeWitt has made false statements in his evacuation report and we therefore should not take the position in court" that the *Final Report* constituted an adequate defense of detention. *Id.* at 294.

75. Despite the government's argument that evacuation was a military necessity, a number of authors have shown that it was not and that the military knew or should have known the falsity of the claim at the time of the evacuation. See, e.g., F. BIDDLE, IN BRIEF AUTHORITY (1962); M. GRODZINS, AMERICANS BETRAYED (1949). By going behind General DeWitt's "finding," the Court could have ordered that this evidence be produced. But, the Court chose not to. The recently established congressional commission to investigate the internment concluded that no military necessity existed and attributed the evacuation and internment primarily to political pressures. See PERSONAL JUSTICE DENIED, *supra* note 1. In 1983, bills were introduced and referred to the judiciary committees of both houses of Congress to provide payments to Japanese Americans displaced in World War II. See S. 1520, 98th Cong., 1st Sess. (1983); S. 2116, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983); H.R. 4110, 98th Cong., 1st Sess. (1983).

repetition. The Japanese-American exclusion cases should be reversed, repudiated, and excised from our law.

THE ANCIENT WRIT OF *CORAM NOBIS*

Res judicata is the principal doctrine standing in the way of reopening the *Hirabayashi* and *Korematsu* cases. In such circumstances, a writ of *coram nobis*⁷⁶ is an appropriate remedy by which a court can correct errors in criminal convictions where other remedies are precluded. The writ is also designed to maintain public confidence in the integrity of the administration of justice. It is appropriate where the procedure by which guilt was ascertained is under attack, and is reserved for extraordinary circumstances. Federal Rule of Civil Procedure 60(b) abolishes common law writs, including the writ of *coram nobis* in civil cases, but the writ is still available to reopen criminal proceedings where other relief is not available. The petition for a writ of *coram nobis* is properly filed in the federal district court in which the conviction was earlier obtained, even though its earlier judgment has been appealed and affirmed by the Supreme Court.

On the basis of the evidence he uncovered in researching this book, Peter Irons and others have prepared petitions of *coram nobis* in the Japanese-American cases. Korematsu's case in the United States District Court for the Northern District of California came to decision on April 19, 1984.⁷⁷ At oral argument, although the government refused to confess error, it "acknowledged the exceptional circumstances involved and the injustice suffered by [Korematsu] and other Japanese Americans."⁷⁸ The court considered the 1982 findings of the Commission on Wartime Relocation and Internment of Civilians that at the time of Roosevelt's

76. The source of a federal court's power to grant *coram nobis* relief lies in the All Writs Act, 28 U.S.C. § 1651(a) (1948). For discussion, see *United States v. Morgan*, 346 U.S. 502 (1954); *James v. United States*, 459 U.S. 1044 (1982) (Brennan, J., dissenting from a denial to grant certiorari); *Chresfield v. United States*, 381 F. Supp. 301, 302 (E.D. Pa. 1974). In *James*, Justice Brennan stated that in "criminal cases, the writ of *coram nobis* itself remains available whenever resort to a more usual remedy would be inappropriate." 459 U.S. at 1047. He observed that "28 U.S.C. § 2255, which has taken over most of the function of the writ of *coram nobis* in federal criminal procedure, only applies to collateral attacks on underlying sentences, and could not be employed to vacate and reenter an order denying a motion under Rule 35." 459 U.S. at 1047, n.5. By a parity of reasoning, *coram nobis* is not defeated in cases like Korematsu's by the habeas corpus provisions of 28 U.S.C. § 2255 because habeas corpus is not an adequate remedy where the sentence has been served and the "in custody" requirements of 28 U.S.C. § 2255 cannot be met. In these unusual circumstances, the extraordinary writ of *coram nobis* is appropriate to correct fundamental errors and prevent injustice. *United States v. Correa De-Jesus*, 708 F.2d 1283 (7th Cir. 1983).

77. *Korematsu v. United States*, No. Cr-27635 W, (N.C. Cal., April 19, 1984) (memorandum opinion, available on Lexis).

78. *Id.* at 26.

executive order and General DeWitt's military orders "there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal."⁷⁹ In granting the writ of *coram nobis*, the court also looked to the original record and to the new evidence uncovered by Irons, observing:

there is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court's determination, although it cannot now be said what result would have obtained had the information been disclosed. Because the information was of the kind peculiarly within the government's knowledge, the court was dependent upon the government to provide a full and accurate account. Failure to do so presents [a] "compelling circumstance" The judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court.⁸⁰

This decision did not reach any errors of law that had been argued by Korematsu because, the court ruled, the writ "was not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors."⁸¹ Thus, the Supreme Court's decision in *Korematsu* still stands as the law of the case. But Fred Korematsu now has his writ of *coram nobis*, and he knows it can be issued "only under circumstances compelling such action to achieve justice" and to correct "errors of the most fundamental character."⁸² Yet he and all Americans must also know that the most fundamental error will not be corrected until the Supreme Court repudiates and reverses its Japanese-American decisions, replacing them with Mr. Justice Murphy's dissent in *Korematsu*.⁸³

Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

79. *Id.* at 19.

80. *Id.* at 26-27.

81. *Id.* at 27.

82. *United States v. Morgan*, 346 U.S. 502, 511-12 (1954).

83. *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).